

119035

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-206708

DATE: July 26, 1982

MATTER OF: International Limousine Service

DIGEST:

1. Contracting officer's determination that low small business quoter was not responsible without referral to SBA under COC procedure was improper. Contracting officer is required by regulation to refer all matters of responsibility to SBA and FPR's provide no exceptions because the procurement was urgent or conducted under a request for quotations.
2. Claim for quotation preparation costs is denied since it cannot be determined that protester had substantial chance of receiving the award.

International Limousine Service (ILS) protests the award of a contract for bus shuttle service under the Federal Energy Regulatory Commission (FERC) request for quotation (RFQ) (standard form 18) No. FERC-82-Q-0005 to another firm.

ILS alleges that its quotation was the lowest price quoted and that, although it did not have the necessary District of Columbia (D.C.) license to provide bus service, it advised FERC that it would subcontract the service for the month estimated necessary to obtain the D.C. license. ILS contends that failure to award to ILS constitutes a negative responsibility determination. Since it was a small business, ILS contends that FERC was required by statute to refer the negative responsibility determination to the Small Business Administration (SBA) for a certificate of competency (COC) determination. ILS requests that FERC refer the responsibility issue to SBA, and, if a COC is granted, the contract be awarded to ILS. In the alternative, ILS claims quotation preparation costs incurred in responding to the RFQ.

FERC reports that the COC procedures were inapplicable since the procurement was conducted under an RFQ and a quotation submitted in response to an RFQ is not a legal offer. FERC therefore contends it never made a nonresponsibility determination, and that, even if we determine a nonresponsibility finding was made, the determination was reasonable because an award to ILS without ILS possessing a license would have risked delay or interruption of contract performance. FERC argues that its failure to refer the matter to the SBA was not prejudicial to ILS since, based on information FERC received from the D.C. licensing authority, ILS could not have obtained the requisite license within the 15-day period specified under the regulations for SBA review of ILS's competency, and because the procurement was urgent--there were only 6 days from the issuance of the RFQ until the date for beginning contract performance--there was insufficient time for SBA review. For these reasons, FERC states that it was not required to refer the matter of ILS's nonresponsibility to the SBA for a COC determination.

We sustain the protest.

The record in this case indicates that FERC issued an RFQ inviting quotations from firms for the shuttle service and quotes were submitted by four firms, including ILS. The contracting officer's "statement of facts" indicates that ILS submitted the low quotation, that a site visit to ILS facilities was conducted, and that an investigation was made to determine ILS's capacity to perform. As a result of this investigation, the agency ascertained that ILS was lacking the general license required for operating a shuttle service in the D.C. metropolitan area. After it was found that ILS did not possess the license, FERC requested Beltway Limousine Service (Beltway), another bidder, to submit a copy of its license and then awarded the contract to Beltway. Notwithstanding FERC's statements to the contrary, this record indicates that the decision to reject ILS's quotation was based on the failure to possess this license and, thus, constituted a negative responsibility determination. See International Business Investments, B-206474, May 27, 1982, 82-1 CPD 500.

FERC's contention that no responsibility determination was made because ILS's quotation in response to the RFQ was not a legal offer is not substantiated by the record. The record clearly indicates that FERC conducted a competitive procurement with the intention of awarding a contract. Furthermore, the RFQ, as amended, is addressed

to "all prospective offerors." While the RFQ included statements that it was a request for information and that a response to the RFQ was not an offer or order, the RFQ did not prohibit an ultimate award on the basis of information submitted, and the record indicates award to Beltway was accomplished as a result of its response to the RFQ.

The Small Business Act, as amended, provides that a small business may not be precluded from an award on the basis of nonresponsibility without referral of the matter to the SBA for final disposition under COC procedures. See the Small Business Act, 15 U.S.C. § 637(b)(7) (1976), as amended by section 501 of Pub. L. No. 95-89, 91 Stat. 557, effective August 4, 1977, and implementing regulations, 13 C.F.R. § 125.5 (1981). The language and legislative history of the act, SBA's implementing regulations, and the Federal Procurement Regulations (FPR) provide no exceptions to this referral procedure. See International Business Investments, supra; Environmental Growth Chambers, B-201333, October 8, 1981, 81-2 CPD 286. Thus, notwithstanding PERC's alleged justifications for not referring the matter of ILS's competency to the SBA, we have held that, under the FPR's, a civilian agency must refer all nonresponsibility issues to the SBA, since the act and the FPR's do not contemplate or contain any exceptions to the referral requirement. International Business Investments, supra; Martel Laboratories, Inc., B-194364, August 7, 1979, 79-2 CPD 91. Furthermore, the fact that an RFQ was used to solicit offers does not exempt the procurement from the referral requirement. See J. L. Butler, B-194932, December 18, 1979, 79-2 CPD 412.

In J. L. Butler, supra, we specifically stated that:

"* * * While the FPR provisions which implement the above provisions of the Small Business Act speak in terms of 'bids' and 'proposals,' we believe the COC procedures are equally applicable to awards made pursuant to quotations under small purchase RFQs. * * *

Therefore, we sustain the protest.

By letter of today to the Secretary of Energy, we are bringing this matter to the Secretary's attention so that action can be taken to preclude a recurrence of this deficiency.

With regard to this protest, we note that the contract with Beltway began on March 1, 1982. The contract is for 6 months with an option year. FERC advises that it is to issue an invitation for bids at the end of the contract period and not exercise the option. Since the contract is substantially performed, no award to ILS under this contract is possible. Consequently, ILS's claim for quotation preparation costs will be considered.

Under similar circumstances, we have concluded that the rejection of a low bid submitted by a small business on the basis of nonresponsibility without referral to SBA was unreasonable and tantamount to arbitrary and capricious action, Environmental Growth Chambers, supra, and in our view, this conclusion is applicable here.

Before quotation preparation costs can be allowed, it must be determined that ILS had a "substantial chance" of receiving the award of the contract. However, we cannot determine whether ILS had a substantial chance of receiving the award. Since neither FERC nor SBA considered ILS's offer to subcontract the service for the month ILS was to obtain a license, we are unable to determine whether ILS could have found a subcontractor with the required license within the short time period prior to the commencement of contract performance. Therefore, since it cannot now be determined whether ILS had a substantial chance of receiving the award, ILS is not entitled to quotation preparation costs. See Timberland-Becraft, Inc., 61 Comp. Gen. (B-202662, B-203656, March 1982), 82-1 CPD 222.

We further note that in light of our decision sustaining ILS's protest, we have not addressed ILS's contention first raised in ILS's comments to FERC's report that the use of small purchase procedures was improper.

for *Milton J. Arnold*
Comptroller General
of the United States